

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MILLARD PERDUE,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION 12-0436-CG-C
	:	
FERRELL GRIMES,	:	
	:	
Defendant(s).	:	

REPORT AND RECOMMENDATION

This action was filed by an inmate and has been referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.2 (c)(4) for appropriate action. It is recommended that this action be dismissed without prejudice for Plaintiff's failure to prosecute and to comply with the Court's order.

Plaintiff, filed a complaint under 42 U.S.C. § 1983, together with a Motion to Proceed Without Prepayment of Fees (Docs. 1, 2), while an inmate at the Covington County Jail, 290 Hillcrest Drive, Andalusia, Alabama 36420. Plaintiff's motion to proceed without prepayment of fees was deemed deficient and the Court granted Plaintiff leave to re-file his motion by either providing the information needed or paying the filing fee (Doc. 3). On August 1, 2012, Plaintiff filed a Motion for Extension of Time to comply with the Court's order (Doc. 4), and on August 16, 2012, Plaintiff did file the new motion to proceed without prepayment of fees (Doc. 5). However, the Court noted on the envelopes which contained Plaintiff's motions a return address which appeared to be a free-world address, 1098 B. C. C. Road, Waynesboro, Alabama 39367. The Court scheduled a hearing on Plaintiff's Motion to Proceed Without Prepayment of Fees and

to determine Plaintiff's release status, on November 9, 2012 (Doc. 6). Plaintiff was cautioned that an unexcused failure to appear for the hearing could lead to dismissal of his lawsuit.

Plaintiff was further ordered to advise the Court no later than November 5, 2012, if the address was indeed a free-world address or if he was still incarcerated at the Covington County Jail. The Clerk was directed to send the Court's order scheduling the November 9, 2012 hearing to Plaintiff at both the Andalusia, Alabama address and the Waynesboro, Mississippi address by certified mail.

On October 29, 2012, the envelope addressed to the Covington County Jail, which contained the Court's October 10, 2012 (Doc. 6), was returned with the notation "Return to Sender – Attempted Not Known – Unable to Forward." (Doc. 8) However, on October 19, 2012, the domestic return receipt, which was attached to the envelope mailed to the Waynesboro, Mississippi address, was returned to the Court with the signature "Martha Perdue." (Doc. 7) Plaintiff failed to appear for the hearing on November 9, 2012, and, as of this date, has not advised the Court of his release status nor has Plaintiff responded in any other manner to the Court's order.

Due to Plaintiff's failure to comply with the Court's order and to prosecute this action, and upon consideration of the alternatives that are available to the Court, it is recommended that this action be dismissed without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure as no other lesser sanction will suffice. See *Link v. Wabash R. R.*, 370 U.S. 626, 630, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (interpreting Rule 41(b) not to restrict the court's inherent authority to dismiss *sua sponte* an action for lack of prosecution); *World Thrust Films, Inc. v. International Family Entertainment, Inc.*, 41 F.3d 1454, 1456-57 (11th Cir. 1995); *Ballard v. Carlson*, 882 F.2d 93 (4th Cir. 1989), *cert. denied*, *Ballard v. Volunteers of America*, 493 U.S. 1084, 110 S.Ct. 1145, 107 L.Ed.2d 1049 (1990); *Mingo v. Sugar Cane Growers Co-op*, 864 F.2d

101, 102 (11th Cir. 1989); *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1983); *Jones v. Graham*, 709 F.2d 1457, 1458 (11th Cir. 1983). *Accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (ruling that the federal courts' inherent power to manage their own proceedings authorized the imposition of attorney=s fees and related expenses as a sanction); *Malautea v. Suzuki_Motor Co.*, 987 F.2d 1536, 1545-46 (11th Cir. 1993) (finding that the court's inherent power to manage actions before it permitted the imposition of fines), *cert. denied*, 510 U.S. 863, 114 S.Ct. 181, 126 L.Ed.2d 140 (1993); *Blunt v. U. S. Tobacco Co.*, 856 F.2d 192 (6th Cir. 1988)(unpublished) (affirming district court's dismissal of *pro se* plaintiff's action for failure to prosecute when plaintiff failed to respond to the summary judgment notice or to show cause why the action should not be dismissed).

The instructions which follow the undersigned's signature contain important information regarding objections to the report and recommendation of the Magistrate Judge.

DONE this 10th day of January, 2013.

s/WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS
AND RESPONSIBILITIES FOLLOWING RECOMMENDATION
AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

1. **Objection.** Any party who objects to this recommendation or anything in it must, within fourteen days of the date of service of this document, file specific written objections with the clerk of court. Failure to do so will bar a de novo determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the magistrate judge. See 28 U.S.C. § 636(b)(1)(C); Lewis v. Smith, 855 F.2d 736, 738 (11th Cir. 1988); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. Unit B, 1982)(en banc). The procedure for challenging the findings and recommendations of the magistrate judge is set out in more detail in SD ALA LR 72.4 (June 1, 1997), which provides that:

A party may object to a recommendation entered by a magistrate judge in a dispositive matter, that is, a matter excepted by 28 U.S.C. § 636(b)(1)(A), by filing a "Statement of Objection to Magistrate Judge's Recommendation" within fourteen days after being served with a copy of the recommendation, unless a different time is established by order. The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party's arguments that the magistrate judge's recommendation should be reviewed de novo and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

A magistrate judge's recommendation cannot be appealed to a Court of Appeals; only the district judge's order or judgment can be appealed.

2. **Transcript (applicable where proceedings tape recorded).** Pursuant to 28 U.S.C. § 1915 and Fed.R.Civ.P. 72(b), the magistrate judge finds that the tapes and original records in this action are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

